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RECORD, CASE No. 14,534.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~679~~. 409 105

SAMUEL LAZARUS, PLAINTIFF IN ERROR,

vs.

WILLIAM WALTER PHELPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED MARCH 23, 1891.

RECORD, CASE No. 14,534.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 679.

SAMUEL LAZARUS, PLAINTIFF IN ERROR,

vs.

WILLIAM WALTER PHELPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 8, 1892.

1 Be it remembered that at a term of the circuit court of the United States in and for the fifth circuit of the United States and the northern district of Texas, begun and holden at the city of Dallas on the 12th day of January, A. D. 1891—present and presiding, the Honorable A. P. McCormick, United States district judge—and which term adjourned on the 6th day of March, A. D. 1891, the following cause came on for trial, to wit:

WM. WALTER PHELPS
vs.
SAM. LAZARUS. } # 1340.

Plaintiff's Original Petition.

In the Circuit Court of the United States for the Fifth Circuit, Northern District, of Texas, Holding Sessions at Dallas, January Term, 1891.

To the judges of said court.

The petition of William Walter Phelps, who is a citizen of the State of New Jersey, residing in the county of Bergen, in said State, complaining of Sam. Lazarus, who is a citizen of the State of Texas, residing in the county of Grayson, in said State, respectfully represents:

1. That on, to wit, the 15th day of April, A. D. 1887, petitioner owned the fee-simple title to and was in the possession as such owner of the following-described surveys of land—that is to say, certain sections of land, each containing 640 acres, all surveyed by virtue of land certificates issued to the Houston & Great Northern Railroad Company, and more particularly described as following-numbered surveys in Childress county, State of Texas, to wit:

2 Surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, and 99, in block # 9; and in the same county surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, in block # 10; and in the same county surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, in block # 14; and in the same county surveys numbered 1, 3, 39, 41, 43, 79, 81, and 83, in block # 18; and in the same county surveys numbered 1, 3, and 19, in block # 19.

Also the following surveys in Collingsworth county, in the State of Texas, to wit: Surveys numbered 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 45, 47, 49, 51, 53, 55, 67, 69, 71, 73, 89, and 91, in block # 10; and in the same county surveys numbered 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, and 99, in block # 14; and in the same county surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, and 37, in block # 15; and in the same county surveys numbered 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81,

83, 85, 87, 89, 91, 93, 95, 97, and 99, in block # 19; and in the same county surveys numbered 1, 3, 5, 7, 9, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 45, 47, 49, 51, 53, 55, 57, 59, 61, and 43, in block # 21.

And the following surveys in Donley county, State of Texas, to wit: Surveys numbered 21, 39, 41, 43, 51, 59, 61, 65, 75, 77, 79, 81, 83, 85, 87, 95, 97, 99, in block # 20, and in the same county surveys numbered 11, 13, 15, and 37, in block # 21.

And the following surveys in the county of Hall, in said State:

3 Surveys numbered 5, 7, 9, 11, 31, 33, 35, 37, 45, 49, 51, 71, 75, 77, 85, 87, 89, and 91, in block # 18; and in the same county surveys numbered 5, 7, 9, 11, 13, 15, and 17, in block # 19; and in the same county surveys numbered 1, 3, and 19, in block # 20—making a grand total of, to wit, one hundred and eighty-six thousand and 880 acres.

2. That on, to wit, the 18th day of April, 1887, the said Sam. Lazarus, without lawful authority and by force of arms, entered upon said land and put thereon large herds of cattle and horses for the purpose of pasturing them thereon, and from that time until now the cattle and horses of the said Sam. Lazarus have pastured upon the said lands and consumed the grass found growing thereon, and said Lazarus has, during the whole of said time, converted to his own use the said land and appropriated and taken to himself all of its benefits as aforesaid.

3. Plaintiff further says that the said lands above described or a portion thereof, to wit, 292 surveys of 640 acres each, were by the New York & Texas Land Co., Limited, on, to wit, the 18th day of April, 1882, leased to W. R. Curtis and T. J. Atkinson, a partnership under the name and style of Curtis & Atkinson; that on said date the said parties respectively made and executed a contract for the lease of said lands for the term of five years, beginning on the 18th day of April, 1882, and ending on the 17th day of April, 1887. The said lessees agreed to pay to the said lessor, its successors or assigns, in advance on the first days of May and November of each year during the continuance of said lease, the sum of eighteen hundred and sixty-eight and $\frac{80}{100}$ dollars, making an annual rental of three thousand seven hundred and thirty-seven and $\frac{60}{100}$ dollars; and it was further provided in said lease contract that as additional compensation for the use of said lands so leased all improvements

4 placed by the lessees upon the said land shall remain thereon and become the property of the said lessors, or those having estate in the premises, upon the termination of this lease, etc.; that under and in accordance with the said lease contract the said Curtis & Atkinson entered into possession of the lands aforesaid and dug wells and made fencing and other improvements thereon, paying rent therefor; that afterwards, by purchase from the said New York & Texas Land Co., Limited, the plaintiff became the owner of said lands and is now the owner thereof, as hereinabove alleged; that about the time of the expiration of the said lease the said Sam. Lazarus, defendant, purchased each and all of the cattle of the said Curtis & Atkinson which were then running in the range upon the said lands; that defendant, instead of surrendering the said lands to plaintiff,

as the said Curtis & Atkinson were bound to do, maintained possession thereof, and has since maintained the same, and has maintained the fences around the whole of said lands, excluding others and the cattle of others therefrom, and has held and is now holding the exclusive possession of the same to his own use and benefit; that he has grazed the said lands of plaintiff aforesaid from said date up to the present time, using the wells and improvements and using and consuming the grass on plaintiff's lands and appropriating the same to his own use.

4. Plaintiff further says that on, to wit, September 17, 1888, plaintiff instituted a suit in the circuit court of the United States for the northern district of Texas, sitting at Dallas, against the said defendant to recover for the use and value of said lands from, to wit, the date of defendant's seizure and possession of the same, as alleged hereinabove, and upon a trial of said cause on, to wit, February 5, 1890, plaintiff recovered judgment for the use and occupation of said lands up to said date the sum of $8,417.00, besides all costs of suit, for which judgment was duly rendered by said court and is still in force and effect.

5 5. Plaintiff says that on, to wit, the date of said judgment, the said Lazarus, without lawful authority and by force of arms, entered upon the land hereinabove described and remained in possession thereof, and put thereon large herds of cattle and horses for the purpose of pasturing the same thereon, and from that time until now the said cattle and horses of the said Lazarus, owned by him or held and grazed for hire for others, have pastured upon said lands and consumed the grass found growing thereon, and the said Lazarus has during the whole of said time converted to his own use and benefit the pasturage and grazing — the said lands and all the benefits thereof.

6. Plaintiff further alleges that the said Lazarus, although said judgment was rendered against him as aforesaid for the use and occupation of the said premises and maintaining the right of the plaintiff to the value of the same, has since said date, notwithstanding said judgment and said proceedings therein, by force and arms remained in the possession of the lands aforesaid, and has since said time maintained the fences around the same, using the fences belonging to the plaintiff for the purpose of excluding the cattle of all other persons from the said lands, and he has since held exclusive adverse possession of the same and of the improvements thereof erected by the said Curtis & Atkinson, the lessees of plaintiff, and which became the property of plaintiff upon the expiration of their lease as aforesaid; that since said date he, the said Lazarus, has grazed said lands of plaintiff with his own cattle and horses and with the cattle and horses of others for hire up to and including the present time, using the wells, water-tanks, improvements, etc., belonging to plaintiff thereon and using, consuming, and destroying all of the grass on plaintiff's lands and appropriating the

6 same to his own exclusive use and benefit.

7. Plaintiff avers that the reasonable actual value of said lands and the grass thereon for grazing at the time the defendant took pos-

session thereof and has remained since said date, to wit, eight cents per acre per annum, and the reasonable rental value of said lands for grazing purposes since the date of the judgment aforesaid has been, to wit, the sum of eight cents per acre per annum, amounting to the sum of, to wit, fourteen thousand dollars per year, all of which the defendant has received and has deprived the plaintiff of; that by reason of the exclusive use and occupation of said premises and the consumption and destruction of the grass thereon the said defendant, Sam. Lazarus, has become liable and promised to pay plaintiff the reasonable value of the same, to wit, the said sum of eight cents per acre per annum, amounting to the said sum of fourteen thousand dollars per annum as aforesaid, and the same the said defendant has failed and refused to pay, in whole or in part, to plaintiff, although often demanded, to the actual damage of plaintiff in the sum of fifteen thousand dollars.

8. The premises considered, plaintiff sues, prays that the said defendant be cited to appear and answer this petition, and that the plaintiff have judgment for his damages aforesaid at the rate of eight cents per acre for each acre annually from and including said 5th day of February, 1890, up to the trial of this cause and for all costs of suit and for general relief.

LEAKE, SHEPARD & MILLER,
Plaintiff's Attorneys.

The foregoing has the following endorsement, to wit:

1340. Wm. Walter Phelps *vs.* Sam. Lazarus. Plaintiff's original petition. Filed Dec. 9, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

7 *Order: Defendant to Amend.*

WM. W. PHELPS
vs.
SAM. LAZARUS. } # 1340.

FEBRUARY 16, 1891.

Ordered by the court that defendant have leave to amend.

8 *First Amended Original Answer.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

WM. WALTER PHELPS
vs.
SAM. LAZARUS. } # 1340.

Now comes the defendant and by leave of the court — his original answer filed herein on the 5th day of Jan'y, A. D. 1891, and for such amendment says:

1st. That he demurs to plaintiff's petition because it is not suffi-

cient in law to require him to answer further herein, and of this he prays the judgment of the court.

HEAD & DILLARD,
Att'ys for Defendant.

2nd. In case the foregoing demurrer is not sustained the defendant for answer herein denies every allegation in plaintiff's petition and demands strict proof thereof.

HEAD & DILLARD,
Att'ys for Defendant.

3rd. For special answer herein this defendant denies that he has ever had or claimed possession of any of the land of plaintiff or exercised any control over the same. He says that he has leased from the State of Texas the even sections of land which are situated between and alternate with the sections claimed by plaintiff, so that each section claimed by him lies between two sections so leased by defendant; that the defendant has so leased and situated in all about 200,000 acres; that anything that may have been done by defendant that tended to keep the stock of other persons from grazing upon plaintiff's land was done solely for the protection of his own land and with no intention whatever of interfering in any way with that of plaintiff; that defendant had so leased from the State greatly more land than he needed to pasture all of his cattle and horses, and if any of them grazed upon plaintiff's land it was because they strayed thereon, he having taken no steps to exclude them therefrom; that so far from defendant having done anything to exclude the stock of other persons from plaintiff's land he avers the truth to be that ever since the decision of the case set forth in plaintiff's petition he has studiously avoided all such acts, and anything that may have been done by those in his employ that had that effect has been in violation of his instructions and without his knowledge or consent, and he avers that no such acts have been committed by his employés; that ever since the rendition of the judgment so set up in plaintiff's petition stocks of cattle and horses amounting to many thousand head belonging to strangers both to plaintiff and defendant, and in which neither of them had any interest, have grazed upon said lands and have eaten up the grass growing thereon and caused great damage to defendant because plaintiff would not exclude them himself and defendant was afraid to do so; that if defendant has done anything to keep off the stock of other persons the plaintiff has been benefitted and not injured thereby, inasmuch as he did not, as above set forth, have at any time stock enough of his own to consume his own grass, and at no time has plaintiff offered or desired to place thereon stock in which he had any interest.

Wherefore, the premises considered, defendant prays that plaintiff take nothing by his suit, and that he be discharged with his costs, and for all other relief the case merits.

HEAD & DILLARD,
Att'ys for Defendant.

10 The foregoing has the following endorsement, to wit:
1340. Wm. Walter Phelps *vs.* Sam. Lazarus. 1st amended original answer. Filed Feb'y 16, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

11 *Judgment.*

WM. W. PHELPS
vs.
SAM. LAZARUS. } # 1340.

FEBRUARY 18, 1891

On February 16, 1891, this cause being regularly called for trial, came the parties, plaintiff and defendant, by attorneys, and announced ready. Then came a jury of twelve good and lawful men, to wit, J. S. Heatheringtom, Chas. W. Guild, L. C. Leeds, John Moreland, J. S. Collins, D. G. Tate, Jno. C. Burnside, Wm. Heppel, J. M. Brown, J. Bostwick, J. E. Laughlin, and R. A. Chadwick, who were duly and legally selected, empannelled, and sworn to try this —, who, after hearing the pleadings, evidence, argument of counsel, and charge of the court, retired to consider of their verdict and thereafter on, to wit, February 18, 1891, returned into open court the following verdict, to wit: "We, the jury, find the verdict of $5,460.32 in favor of the plaintiff.—Chas. W. Guild, foreman."

It is therefore considered by the court and so ordered and adjudged that the plaintiff, William Walter Phelps, do have and recover of and from the defendant, Sam. Lazarus, the said sum of five thousand four hundred sixty and $\frac{32}{100}$ dollars, with interest thereon from this date at the rate of eight per cent. per annum, besides all costs of suit, for which let execution issue.

It is further ordered that execution issue against each party hereto for the costs by them herein respectively incurred.

12 *Motion for New Trial.*

WM. WALTER PHELPS
vs.
SAM. LAZARUS. } # 1340.

Tried in circuit court of the United States for the northern district of Texas, at Dallas.

Now comes the defendant and moves the court to grant him a new trial herein:

First. Because the court erred in refusing to exclude that part of the deposition of plaintiff's witness, Ira H. Evans, as shown by bill of exceptions.

Second. The court erred in giving the charge requested by plaintiff, as shown by the bill of exceptions.

Third. The court erred in refusing charge- Nos. 1, 2, 3, 4, 5, and 6, requested by defendant.

Fourth. The verdict of the jury is not supported by the evidence in the case in that the preponderance of the evidence shows that plaintiff neither asserted exclusive proprietorship of the land as presented in the charge requested by plaintiff nor practically excluded plaintiff as presented in the charge given by the court on its own motion.

HEAD & DILLARD,
Att'ys for Def't.

The foregoing has the following endorsement, to wit:
1340. Wm. Walter Phelps *vs.* Sam. Lazarus. Motion for new trial. Filed Feb'y 18, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

13 *Order on Motion for New Trial.*

WM. W. PHELPS
vs.
SAM. LAZARUS. } #1340. Feb'y 23, 1891.

On this day came on to be heard the motion of the defendant for a new trial herein, and the court, having heard and considered said motion, is of the opinion that the same is not well taken, and it is ordered that said motion be, and it is hereby, overruled and refused.

(Here follows diagram marked p. 14.)

15 *Bill of Exceptions.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

WILLIAM WALTER PHELPS
vs.
SAM. LAZARUS.

Be it remembered that upon this the 16th day of February, 1891, this case was called for trial and came on to be heard before the court and jury.

1. It was agreed that the plaintiff was the owner in fee simple of the lands described in his petition situated in Childress, Collingsworth, Donley, and Hall counties, in the State of Texas, said land being located in alternate sections of 640 acres each, plaintiff owning the odd-numbered and the free-school fund of Texas the even-numbered sections.

2. It was proved that the plaintiff had leased the lands in controversy and others to Curtis & Atkinson April 15th, 1882, expiring April 15th, 1887, and by the terms of said lease fences and water tanks were permitted to be erected by the lessee, all of which, so far as situated upon plaintiff's lands, became his property at the expiration of the lease.

3. That Curtis & Atkinson erected fences around said land or the

greater portion thereof, the same being built partly upon plaintiff's sections and partly upon those belonging to the school fund, alternating therewith. A map of the said lands was exhibited to the jury as a part of the evidence, and the same is attached hereto and made a part hereof and marked "Exhibit A." The red zigzag line on said map represents the fences described above. The sections colored red on said map are those which had been sold by plaintiff prior to the institution of this suit. Those sections marked in blue are such as have been sold by the State of Texas out
16 of the school-fund portion since the execution of the lease hereinafter mentioned to defendant. The lands marked with a red cross are school-fund sections within said fences that were not leased to the defendant by the State.

4. The defendant, Lazarus, leased from the State of Texas, in July, 1887, for four years, subject to the right of sale, all of the school-fund sections within the fence lines on said map save and except such as are marked with a red cross in said map, the same amounting to about two hundred and sixty (260) sections.

5. The plaintiff has sold of his said lands within said pasture limit about thirty thousand (30,000) acres, and had on the day of trial remaining within the limits of said enclosure one hundred and forty-nine thousand seven hundred and sixteen (149,716) acres, and the State of Texas had sold about ninety-six (96) sections of the land leased by it to defendant, leaving him within said enclosure, under valid lease from the State at the time of trial, one hundred and two thousand five hundred and sixty (102,560) acres.

6. The evidence showed further that the fence around said land is a substantial barbed-wire fence, fastened to wooden posts at convenient distances and sufficient to turn cattle and keep them within or without the enclosure.

7. It is proved that the plaintiff lived in the State of New Jersey and had no cattle within said enclosure. It is further proved that plaintiff had not attempted to remove any part of the fences from the sections of land belonging to him since the expiration of the Curtis & Atkinson lease, but that he has never done anything towards keeping the same in repair.

8. The defendant has never paid plaintiff anything for the use of his land; that the value of the land within said enclosure
17 belonging to plaintiff for the current year is reasonably worth for grazing purposes and the use of the grass thereon the sum of four (4) cents per acre per annum.

9. Plaintiff then proved that on September 17th, 1888, he instituted suit in this court upon a petition containing allegations similar to those in this case against the defendant for the use of said land since the expiration of the Curtis & Atkinson lease, and in said suit recovered judgment on the 5th February, 1890, for the use and occupation of said land up to said date for the sum of eight thousand four hundred and seventeen dollars ($8,417.00). This evidence was offered to establish the fact that defendant did have exclusive possession of said land as charged by plaintiff in said suit, and to show that plaintiff had claimed for the use and value

of his land from the time of the original occupation of the same by defendant. To the introduction of this petition and judgment when offered defendant then and there objected because it was irrelevant and immaterial and did not tend to establish the allegation in plaintiff's petition which related exclusively to transactions occurring since the rendition of said judgment; but the court overruled the objection and admitted the evidence; to which defendant then and there excepted.

10. Plaintiff proved by T. D. Hobart and —— Cunningham that they lived in that section and were familiar with the grazing capacity of the said lands, and that upon an average it would require from fifteen to twenty acres per annum to properly maintain one head of cattle, and that in the condition of the range within the pasture during the year past it would require probably twenty-five acres.

They had been over the range several times during the
18 year past, the last being in January of this year, and found the grass short and badly eaten out generally, except in the N. E. part adjacent to the settlers, where it was in fair condition; that the lands generally showed that they were stocked to their full capacity. They saw a great many cattle in the pasture in defendant's brand, but could form no certain or accurate estimate of the number. There were a few cattle in other brands which they supposed to belong to settlers. They rode entirely around the fence line and found the fences in good condition and repair. The lands enclosed border for ten miles or more on the 100th meridian or what is known as the line of the Indian Territory or Greer county. This fence is built on the plaintiff's and the school lands and some five or six varas within the Texas boundary.

During November, 1890, witnesses, riding along this line and near the N. E. corner of the pasture, met G. W. Wilkes, who was then and is now in the employ of the defendant as a ranchman. He was riding defendant's horse and had a hammer and a basket of fence staples and they saw him fasten a slat upon the fence with a staple. He said he was out repairing the fence, but had not been so engaged for a long time, and asked them how far they had come and in what condition the fence was. Being informed by them that they had ridden the entire Greer County fence line, and that it was in good repair, he remarked, "I am glad, for it saves me a long ride."

11. It was proved that the fences were an advantage to the occupant of the range, because they not only prevented the cattle within from drifting, but protected the range from cattle drifting into it, as they were likely to do in great numbers in bad weather; that there — many cattle running at large in the Greer County or Indian Territory country which would drift into this range were it not for the fence.

19 12. Plaintiff read in evidence the following letter:

SHERMAN, TEXAS, *March 20th*, 1890.

Ira H. Evans, Esq., Austin, Texas.

DEAR SIR: This will notify that I will take down all fences in Hall, Donley, and Collingsworth counties that I can as the law directs.

Respectfully,
(Signed) SAM. LAZARUS.

Ira H. Evans is the general agent of the plaintiff for all his lands in Texas and has full control. His office is at Austin.

It was proved that defendant had not removed one panel of fence.

13. It was proved that there was a large watering tank upon plaintiff's section # 85, that had been built by Curtis & Atkinson under their lease and which had been in use by defendant's cattle.

14. L. H. Hill testified for plaintiff that in May, 1890, he drove about 2,500 head of cattle up the Denver railway, to be shipped at Giles' station, which is in said pasture, when they met Pat. Wolforth, who is defendant's foreman in charge of the ranch, the defendant himself living at Sherman and only visiting the ranch at intervals. Wolforth in a violent manner told them that they would have to take their herds out of the pasture unless they got defendant's consent. He claimed the water and grass therein for defendant. He was abusive to Hill and drew his pistol on him. He finally said that they might keep their cattle in the pasture provided they did not pass a line one and one-half miles from Giles' station, and said if they passed this line he would put them out by force. The cattle were kept within the boundary for a few
20 days until cars were obtained for their shipment. Wolforth and his "outfit" remained in camp near by all the time Hill was there.

15. It was also proved that the Western Cattle Co. had, by contract with defendant in the spring of 1890, shipped and turned into the pasture 3,000 head of cattle, for the pasture of which they were to pay $1.50 per head when delivered back. About 1,800 of these had been shipped out in the summer and fall and paid for. The remainder were still in the pasture.

1. The defendant, to maintain the issue on his part, offered W. S. Moore, Wm. Curtis, J. M. Ball, Pat. Wolforth, and himself, who said that in their opinion ten acres of the land in controversy were sufficient for one head of cattle per annum; that there were two railway stations in said pasture on the line of the Fort Worth & Denver R. R., and that one of these, Giles, was a very heavy shipping point, the witness Wolforth saying that he had seen about 50,000 head of cattle shipped from there from spring to winter of 1890. These cattle were driven across the pasture near the railway from north and south.

2. He proved by his witness Wolforth that he rendered for taxation for defendant, in the spring of 1890, 10,500 head of cattle, and

that he thought these were all the cattle defendant had in the pasture on January 1st, 1890, from which time the tax assessment dated.

3. Defendant himself and his witness-, Curtis, Wolforth, and Ball, testified that in their opinion in the fall of 1890 defendant had not over 13,000 head of cattle in the pasture; that he bought and shipped in during the year about 1,800 head, and shipped out during — about 4,500 head. Wolforth stated that about 1,200 calves were branded in the branding season of 1890. The cattle had never
21 been counted save such as had been shipped in and out, and the witnesses merely estimated the number as best they could.

4. These witnesses also proved that there was about 150 actual settlers within the enclosure, and that they had altogether from two to three thousand head of cattle, which ran at large, mingling with defendant's cattle on the range.

5. Plaintiff also testified that he had under lease about 50,000 acres in pasture adjoining the one in controversy on the south, in which he allowed his cattle to run, but it was also proved that this was chiefly used to turn his horses in and for beeves, and that the fence of the pasture in controversy separated the two for a line of about ten miles, through which the only passage was by gate, and that this fence was on the lands of plaintiff and the leased lands of defendant, as they alternated in sections, and that it was up and in good repair.

6. Defendant also proved by himself and Wolforth that they had never excluded any one, not even strangers, from the pasture, and that the only time any controversy had ever arisen was the difficulty between Wolforth and Hill, and this arose out of a personal difficulty between said parties; that they had never asserted or claimed exclusive possession of said pasture or authorized any one else to do so; that they never repaired any of the fence around said pasture or authorized it to be done, and did not authorize Wilkes to make the repairs hereinbefore referred to in November, 1890; that neither plaintiff nor any one claiming under him had ever requested joint occupancy of said pasture; that no part of the fence around the pasture had been removed either by plaintiff or defendant; that the pasture owners adjoining were also interested in having these fences maintained. Defendant also proved by C. A. Embree that
22 the fence on the south side of the pasture had been kept up by the Childress County Land & Cattle Company and that on the north side by Rocking Chair ranch and Rone Bros. and that on the west side by Bugbee & Coleman.

7. Defendant introduced no evidence to show by whom the east fence along the Greer county line had been kept in repair.

8. The evidence of defendant's witnesses also tended to show that the pasture had not been stocked to its full capacity, and was shorter close to the water along the railroad and along the south string of fence than out in the pasture.

Upon this evidence the court, at the request of plaintiff, gave the following charge to the jury, to wit:

The evidence in this case shows that on the 5th day of February, 1890, the plaintiff, William Walter Phelps, owned in fee simple

149,716 acres of land, which he still owns, in Childress, Collingsworth, Hall, and Donley counties, and that defendant on said date had and has now possession, under valid lease from the State of Texas, of about 102,560 acres, all of which lands are within an enclosure composed of substantial wire fences, which practically prevent ingress and egress of cattle thereto and from. It is also in evidence that since Feb'y 5th, 1890, the defendant, Sam. Lazarus, has had cattle grazing upon and over said lands in general and that plaintiff has had none thereon. Now, if you believe from the evidence that since said 5*ht* day of February, 1890, the defendant has had possession of the lands of plaintiff within said enclosure (and exclusive of the lawful rights of settlers upon school lands under the State enclosure laws), has claimed and exercised the exclusive use and enjoyment of plaintiff's lands for grazing purposes, and has attempted to exclude others therefrom, either by maintaining
23 fences or line riding or by force through his employees or by any or all of these means, then you will find for the plaintiff such sum as the evidence shall show to be the reasonable value of the use and occupation of plaintiff's lands so had by defendant for grazing purposes from said 5th day of February, 1890, to this date; to the giving of which charge the defendant then and there excepted, because an attempt to exclude strangers from said pasture would not render him liable, there being no attempt to exclude plaintiff or any one claiming under him.

The court then instructed the jury further substantially as follows:

If you believe from the evidence that the defendant, with intent to graze the lands of plaintiff in common with his own, turned his cattle upon the lands within the enclosure in numbers sufficient to consume the grass thereon and to keep them stocked to their full capacity during the time from February 5th, 1890, to this date, then you will find for the plaintiff the reasonable value of the use of his lands for such grazing purposes, as shown by the evidence, from February 5th, 1890, to date. If the evidence does not so satisfy you as set forth in one or the other of thes- charges you will find for the defendant.

And the defendant then requested the court to give the following charge to the jury, to wit:

Where two persons own land in a common pasture either has the right to place his stock therein and is not liable to the other therefor; which the court refused, and the defendant then and there excepted.

And the defendant then requested the court to give the following charge to the jury, to wit:

24 Where several persons own separate tracts of land in the same enclosure, each one has the right to place enough stock therein to consume the grass upon his part of the land and is not liable to the others therefor, but if he places therein more stock than his part of the land will reasonably maintain he will be liable to the other owners for the excess, but no more; which charge the court refused to give, and the defendant then and there excepted

because said charge presented the law as applied to the evidence and no charge was given by the court upon the issue therein presented.

And the defendant then requested the court to give the following charge to the jury, to wit:

If you believe from the evidence that plaintiff's grass was consumed by stock of defendant and other persons, then defendant would only be liable for the part consumed by his own stock, to be ascertained by apportioning the total damage in the proportion that the number of his stock bears to the total number doing the damage; which charge was refused by the court, and the defendant then and there excepted because the said charge was correct as applied to the evidence and no charge was given by the court upon the issue therein presented.

And because none of said exceptions so offered and made to the rulings, opinions, and decisions of the presiding judge do appear upon the records of said trial, now, therefor-, on the prayer of the defendant this bill of exceptions is hereby made, stated, settled, and allowed at the time of the trial of said cause.

Witness my hand and seal the 25 day of February, A. D. 1891, during the trial term.

A. P. McCORMICK, *Judge.*

25 The foregoing has the following endorsement, to wit:

William Walter Phelps *vs.* Sam. Lazarus. Bill of exceptions. Filed Feb'y 25, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

26 *Petition for Writ of Error.*

Error from Circuit Court of the United States for Northern District of Texas, at Dallas.

SAMUEL LAZARUS, Plaintiff in Error,
vs.
WILLIAM WALTER PHELPS, Defendant in Error.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States:

Samuel Lazarus, plaintiff in error, complains of William Walter Phelps, defendant in error, and shows that on the 18th day of February, A. D. 1891, in a certain cause pending in the circuit court of the United States for the northern district of Texas, at Dallas, wherein William Walter Phelps was plaintiff and Samuel Lazarus was defendant, the said William Walter Phelps recovered a judgment against the said Samuel Lazarus for the sum of five thousand four hundred and sixty and $\frac{32}{100}$ dollars, and because in the record and proceedings, as also in the rendition of said judgment, manifest error hath happened, to the great damage of the said Samuel Lazarus, he, the said Samuel Lazarus, prays that a writ of error be allowed him commanding the judge of the said circuit court of the United States

for the northern district of Texas to send the record and proceedings in said cause, with all things concerning the same, together with said writ, to the Supreme Court of the United States, at Washington, on the 29th day of March, A. D. 1891, so that the said Supreme Court may cause further to be done therein to correct said error what of right should be done according to the laws and customs of the United States.

S. HARE & HEAD & DILLARD,
Att'ys for Samuel Lazarus, Plaintiff in Error.

27 Allowed Feb'ry 28th, 1891.

A. P. McCORMICK, *Judge.*

The foregoing has the following endorsement, to wit:
Samuel Lazarus, plaintiff in error, *vs.* William Walter Phelps, defendant in error. Petition for writ of error. Filed Feb'y 28, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

28 Know all men by these presents that we, Sam. Lazarus, as principal, and —— ——, as sureties, are held and firmly bound unto William Walter Phelps in the full and just sum of eleven thousand dollars, to be paid to the said William Walter Phelps, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a regular term of the circuit court of the United States for the northern district of Texas, at Dallas, in a suit depending in said court between William Walter Phelps, plaintiff, and Sam. Lazarus, defendant, numbered 1340 on the docket of said court, a judgment was rendered against the said Sam. Lazarus for the sum of five thousand four hundred sixty and $\frac{32}{100}$ dollars and the costs of suit on February 18th, 1891, and the said Sam. Lazarus having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said William Walter Phelps citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Sam. Lazarus shall prosecute his writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and vi-tue.

29 SAM. LAZARUS,
Per HEAD & DILLARD,
His Att'ys. [SEAL.]
R. M. SMITH. [SEAL.]
JNO. SUMMERFIELD. [SEAL.]

Sealed and delivered in the presence of—
T. LA HACHE.
H. O. HEAD.

Approved by—
A. P. McCORMICK,
U. S. District Judge.

As a supersedeas writ of error bond.

R. M. Smith, being duly sworn by me, says he is worth in his own right, over and above all his debts and liabilities, at least the sum of twenty-five thousand dollars.

R. M. SMITH.

Sworn to and subscribed before me this 26 day of Feb'y, 1891.
[SEAL.] CHAS. CRENSHAW,
Notary Public for Grayson County, Texas.

John Summerfield, being duly sworn by me, says that he is worth in his own right, over and above all his debts and liabilities, at least the sum of fifty thousand dollars.

Sworn to and subscribed before me this 28 day of February, 1891.
[SEAL.] ROBT E. L. KNIGHT,
Notary Pub., Dallas Co., Texas.

The foregoing has the following endorsement, to wit:
Filed Feb'y 28, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States to William Walter Phelps, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 29th day of March, A. D. 1891, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Dallas, wherein Samuel Lazarus is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. P. McCormick, judge of the district court of the United States, this 28th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

A. P. McCORMICK,
U. S. Dist. Judge, N. D. of Texas.

30½ [Endorsed:] Filed Feb'y 28, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

I hereby admit due and legal service of a copy of this citation upon William Walter Phelps, defendant in error, and upon *me*, his attorney-, and waive all other service and notice thereof.

LEAKE, SHEPARD & MILLER,
Att'ys for Wm. W. Phelps, Def't in Error.

Feb'y 28th, 1891.

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between William Walter Phelps, plaintiff, and Samuel Lazarus, defendant, a manifest error hath happened, to the great damage of the said Samuel Lazarus, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 29th day of March next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

J. H. FINKS,
Clerk of the Cir. Court of the United States,
By CHAS. H. LEDNUM, *Deputy.*

Allowed by—
A. P. McCORMICK,
U. S. Dist. Judge.

31½ [Endorsed:] Filed Feb'y 28, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

I hereby admit due and legal personal service of a copy of this writ upon William Walter Phelps, defendant in error, and upon *me*, *her* attorney-, and waive all other service and notice thereof.

This 28th day of February, A. D. 1891.

LEAKE, SHEPARD & MILLER,
Att'ys for Wm. W. Phelps, D'f't in Error.

32 *Assignment of Errors.*

SAMUEL LAZARUS, Plaintiff in Error,
vs.
WM. WALTER PHELPS, Defendant in Error.

In error before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington.

Comes now Samuel Lazarus, the plaintiff in error, by S. Hare and Head & Dillard, his attorneys, and says that in the record and proceedings herein there is a manifest error in this, to wit:

1. There was an error in the action of the trial judge in permitting plaintiff to prove that on September 17, 1888, he instituted suit in this court upon a petition containing allegations similar to those in this case against the defendant for the use of said land since the expiration of the Curtis & Atkinson lease, and in said suit recovered judgment in this court on the fifth day of February, 1890, against the defendant for the sum of $8,417.00.

2. There was also error in the action of the trial judge in giving to the jury the charge requested by the plaintiff: That if they believed from the evidence that since said 5th day of February, 1890, the defendant has had possession of the lands of plaintiff within said enclosure and exclusive of the lawful rights of settlers upon school lands under the State enclosure laws, has claimed and exercised the exclusive use and enjoyment of plaintiff's land for grazing purposes, and has attempted to exclude others therefrom, either by maintaining fences or land riding, or by force through his employees, or by any or all of these means, then you will find for the plaintiff such sum as the evidence should show to be the reasonable value of the use and occupation of plaintiff's land so had by defendant for grazing purposes from the said 5th day of Feb-
33 ruary, 1890, to this date.

3. There was also error in the action of the trial judge in refusing to charge at the request of defendant that where two persons own land in the same pasture either has the right to place his stock therein without being liable to the other.

4. There was also error in the action of the trial judge in refusing to charge the jury at the request of defendant that where several persons own separate tracts of land in the same pasture each one has the right to place enough stock therein to consume his part of the grass and is not liable to the others therefor, and if he place more stock than his part of the land will reasonably maintain he is only liable for the excess to the other owners.

5. There was also error in the action of the trial judge in refusing to charge the jury at the request of the defendant that if they believed that plaintiff's grass was consumed by the stock of defendant and other persons, the defendant would only be liable for the part consumed by his own stock, to be ascertained by apportioning the total damage in the proportion that the number of his stock bears to the total number doing the damage.

6. There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said William Walter Phelps, whereas by the law of the land the said judgment ought to have been given for the said Samuel Lazarus against the said William Walter Phelps, and the said Samuel Lazarus prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things that he has lost by occasion thereof.

S. HARE AND
HEAD & DILLARD,
Att'ys for Samuel Lazarus, Plaintiff in Error.

34 The foregoing has the following endorsement, to wit:
Samuel Lazarus, plaintiff in error, *vs.* William Walter Phelps, defendant in error. Assignments of errors. Filed Feb'y 28, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

35 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in cause # 1340, of William Walter Phelps, plaintiff, *vs.* Sam. Lazarus, defendant, lately pending in said court, at Dallas, Texas, except that the original writ of and citation in error are included in the transcript instead of copies thereof.

In testimony whereof I have hereunto affixed the seal of said court, at Dallas, Texas, and the signature of the clerk thereof this the 9th day of March, A. D. 1891.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS,
Clerk of said Court,
By CHAS. H. LEDNUM, *Deputy.*

Endorsed on cover: Case No. 14,534. N. Texas C. C. U. S. No. 679. Samuel Lazarus, plaintiff in error, *vs.* William Walter Phelps. Filed March 23d, 1891.

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409

Office Supreme Court U. S.
FILED.
MAR 12 1894
JAMES H. McKENNEY,
CLERK.

156-202

In the Supreme Court of the United States.

Record No. 14,534. Case No.

SAMUEL LAZARUS, Plaintiff in Error,

vs.

WILLIAM WALTER PHELPS, Def't in Error.

Error to the United States Circuit Court for the Northern District of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

Record No. 14,534. Case No.

SAMUEL LAZARUS, Plaintiff in Error,

vs.

WILLIAM WALTER PHELPS, Def't in Error.

Error to the United States Circuit Court for the Northern District of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This suit was instituted on the 9th day of December, 1890, by William Walter Phelps, a citizen of New Jersey against Samuel Lazarus, a citizen of Texas, in the United States Circuit Court for the Northern District of Texas to recover damages for the use and occupation of plaintiff's land from the 5th day of February, 1890, to the time of trial, the allegations of plaintiff's petition being that defendant permitted large herds of his cattle and horses to graze upon plaintiff's lands and used them for pasturage for other cattle for which he received hire.

The case was tried and on the 18th day of February, 1891, resulted in verdict and judgment for plaintiff below in the sum

of $5,460.32, and is brought before this court for review by defendant below, Samuel Lazarus, here plaintiff in error.

The evidence showed that William Walter Phelps was the owner in fee simple of 149,716 acres of land situated in Childress, Collingsworth, Donley and Hall counties in the State of Texas. This land was in sections of 640 acres each, alternating with like sections owned by the public school fund of the State of Texas, plaintiff owning the odd numbered sections and that fund owning the even numbered sections. In July, 1887, defendant Lazarus had rented from the State of Texas for four years from that date its sections of land named above. This land was rented by Lazarus subject to the right of sale in the State of Texas, and it had sold prior to the time of the trial 260 sections of the land. The plaintiff, Phelps, prior to the time of trial, and prior to the time of Lazarus' lease had a much larger quantity of land than the land stated above as belonging to him at the time of trial, and prior to the trial had sold thirty thousand acres of this land.

At the time the trial was had there was around the body of land belonging to plaintiff and defendant and the lands sold by plaintiff and the State, as above shown, except a few sections, a substantial barbed wire fence fastened to wooden posts at convenient distances, and sufficient to turn cattle and keep them within or without the enclosure; that is to say, there were included within a fence of this description the odd numbered sections belonging to the plaintiff Phelps, the even numbered sections leased by defendant Lazarus, sundry sections which had been sold out of this leased land by the State of Texas and sundry other sections which had been sold by plaintiff Phelps. The value of the land for pasturage was four cents per acre per annum. The lands of plaintiff had been rented to Curtis & Atkinson on April 15th, 1882, and the lease expired on April 15th, 1887. Curtis & Atkinson built fences around the land or a greater portion of it in the manner indicated, this fence being partly upon the plaintiff's land and

partly upon the school land. This will be made plain by a map which appears in the transcript of the record between pages 6 and 7. By the terms of the lease between Phelps and Curtis & Atkinson the fence and water tanks were permitted to be erected, and so far as situated upon plaintiff's land became his property at the expiration of the lease. Phelps had no cattle within the enclosure, but the settlers, about one hundred and fifty in number, did have about three thousand head of cattle there, running at large and mingling with defendant's cattle. Defendant had within the enclosure a number of cattle estimated by the witnesses to be about ten thousand five hundred head. The fences around the enclosure were useful both to prevent cattle within from straying out, and cattle on the outside from breaking into it.

Plaintiff over defendant's objections proved that on the 17th day of September, 1888, he had instituted a suit similar to this one against defendant, and on the 5th day of February, 1890, recovered judgment for the use and occupation of the land to that date. It was proved that the fence on the south side of the pasture had been kept up by the Childress County Land & Cattle Company, that on the north side by the Rocking Chair Ranch and Rowe Bros. and that on the west side by Bugbee & Coleman. No evidence was introduced showing by whom the east fence along the Greer County line was kept in repair. The evidence of plaintiff tended to show that the pasture had been stocked to its full capacity. The evidence of the defendant showed the contrary. The charge of the court was based on the theory that if defendant maintained the fences about the pasture, plaintiff would be entitled to recover rents from him for the land. (Printed Tr. pp. 7 to 13.)

ASSIGNMENT OF ERRORS.

1. There was an error in the action of the trial judge in permitting plaintiff to prove that on September 17th, 1888, he instituted suit in this court upon a petition containing allega-

tions similar to those in this case against the defendant for the use of said land since the expiration of the Curtis & Atkinson lease, and in said suit recovered judgment in this court on the fifth day of February, 1890, against the defendant for the sum of $8,417.00.

2. There was also error in the action of the trial judge in giving to the jury the charge requested by the plaintiff. That if they believed from the evidence that since said 5th day of February, 1890, the defendant has had posessession of the lands of plaintiff within said enclosure and exclusive of the lawful rights of settlers upon school lands under the state enclosure laws, has claimed and exercised the exclusive right and enjoyment of plaintiff's lands for grazing purposes, and has attempted to exclude others therefrom, either by maintaining fences or line riding, or by force through his employees, or any or all of these means, then you will find for the plaintiff such sum as the evidence should show to be the reasonable value for the use and occupation of plaintiff's land so had by defendant for grazing purposes from the said 5th day of February, 1890, to this date.

3. There was also error in the action of the trial judge in refusing to charge at the request of defendant that where two persons own land in the same pasture, either has the right to place his stock therein without being liable to the other.

4. There was also error in the action of the trial judge in refusing to charge the jury at the request of defendant that where several persons own separate tracts of land in the same pasture each one has the right to place enough stock therein to consume his part of the grass, and is not liable to the others therefor, and if he place more stock than his part of the land will reasonably maintain, he is only liable for the excess to the other owners.

5. There was also error in the action of the trial judge in refusing to charge the jury at the request of the defendant that if they believed that plaintiff's grass was consumed by the

stock of the defendant and other persons, the defendant would only be liable for the part consumed by his own stock, to be ascertained by apportioning the total damage in the proportion that the the number of his stock bears to the total number doing the damage.

6. There is also error in this, to-wit: that by the record aforesaid it appears that the judgment aforesaid was given for the said William Walter Phelps; whereas by the law of the land the said judgment ought to have been given for the said Samuel Lazarus against the said William Walter Phelps, and the said Samuel Lazarus prays that the judgment afore said may be reversed, annulled and altogether held for nothing, and that he may be restored to all things that he has lost by occasion thereof. R. p. 17.

ARGUMENT.

I.

There was error in permitting the introduction in evidence of the pleadings and the judgment rendered in the suit between these same parties, which resulted in judgment on February 5th, 1890.

First: The action was brought for rents accruing subsequent to the 5th day of February, and a judgment establishing the fact that defendant was indebted to plaintiff on rents prior to that time, or in possession of the premises prior to that time, in no way tended to show that he owed for rents subsequent to that time, or remained in possession of the lands after the rendition of the judgment.

Second: The judgment did not throw any light upon any of the

issues necessary to the determination of the case, but did tend to mislead the jury to defendant's prejudice.

It appears from the record that on the 17th day of September, 1888, plaintiff Phelps, instituted a suit in the United States Circuit Court for the Northern District of Texas upon a petition containing allegations similar to those in this case against the defendant for the use of the land since the expiration of the Curtis & Atkinson lease, and in said suit on the 15th day of February, 1890, recovered judgment for the use and occupation of said land up to date for the sum of $8,417. This evidence was offered to establish the fact that defendant did have exclusive possession of the land as charged by plaintiff in said suit, and to show that plaintiff had claimed for the use and occupation of the land from the time of the original occupancy of the same by defendant. Defendant objected to the introduction of the petition and judgment because it was irrelevant and immaterial, and did not tend to establish the allegations in plaintiff's petition which related exclusively to transactions occuring since the rendition of the judgment. These objections, it is believed, were well made and should have been sustained. R. p. 8.

II.

There was error in charging the jury that if from the 5th day of February, 1890, the defendant had possession of the lands of plaintiff within said enclosure and "exclusive of the lawful rights of settlers upon school lands," had claimed and exercised the exclusive enjoyment of plaintiff's lands

for grazing purposes, and had attempted to exclude others therefrom, either by maintaining fences or line riding, or by force through his employees, or by any or all these means, to find for plaintiff.

First: The evidence was wholly insufficient to warrant a charge predicated upon the fact that plaintiff had kept others from the land and appropriated it to his sole use.

A reading of the evidence as set forth in the bill of exceptions would seem to show the correctness of the proposition just made. If the court felt warranted in giving such charge because of the judgment rendered before this time, then his action in so doing but emphasizes the error he made in admitting that judgment, and makes but clearer the correctness of the position which we have contended for under the assignment of error alleging its admission to have been improper. If the judgment established that plaintiff had exclusive possession of the land, and for this purpose it was offered, then it would have established such possession as existing only prior to the date of its rendition, and could have no force in showing that plaintiff was in possession of the land subsequent to such time. If the court felt warranted in giving the charge on the ground of the exclusion of others by force, then the only evidence given for plaintiff on which the charge was based was the evidence of Hill that in May, 1890, he drove about twenty-five hundred head of cattle up the Denver railway to be shipped at Giles station which is in said pasture, and that Pat Wolforth, defendant's foreman in charge of the ranch, in a violent manner told them that they would have to take their herds out of the pasture unless they got defendant's consent; that he claimed the grass and water therein for defendant and was abusive toward Hill and drew his pistol upon him. He finally said they might keep their cattle in the pasture provided they did not pass a line a mile and a half from Giles station and

that if they did pass this line he would put them out by force. R. p. 10.
These cattle had been brought to Giles station for the purpose of shipping. This was a very heavy shipping point and Wolforth had seen about fifty thousand head of cattle shipped there from the spring to the winter of 1890, and these cattle were driven across the pasture near the railway from north to south. Wolforth testified and defendant testified that they had never excluded anyone, not even strangers, and that the only time any controversy had ever arisen was at the time of the difficulty between Wolforth and Hill, and this arose out of a personal difficulty between the parties, and that they had never asserted or claimed exclusive possession of the pasture or authorized any one else to do so. If it be true that the testimony R. p. 11. of Hill could be taken as proving everything which plaintiff claims it proves, if it be true that the testimony of Wolforth that the difficulty was a personal one is false, yet was the evidence not sufficient to warrant the charge of the court. It is shown that Hill was attempting to herd his cattle upon the pasture for the purpose of shipping. Defendant's lands were included within the fence along with plaintiff's, and he may well have objected to the cattle's being so herded for shipping purposes, he may well have demanded that they be moved or quickly shipped, he may well have demanded that they be not herded from place to place on the land, and yet this would in no way tend to prove that he was attempting to use the land exclusively for his own purposes, nor would it tend to prove that he was forbidding others from permitting their cattle to graze upon said lands. The only thing that it would tend to prove would be that he forbade the herding of large numbers of cattle upon the lands prior to their shipment; not that he forbade the land being used as a pasture, but that he forbade its being used as a herding pen.

Did the court base this charge upon the theory that defendant maintained the fences, then upon this point the evidence wholly fails. The only evidence remotely tending to show

this was the evidence of a witness for plaintiff that he had seen one man starting out with a hammer and a basket of staples along the fence; that this man was riding defendant's horse and was in the employ of defendant and was repairing the fence. Being informed by the witness and his companion that they had ridden the entire Greer County line, he remarked, "I am glad of it because it saves me a long ride." In answer to a suspicion that might have been raised by this evidence standing alone, it was shown by defendant and Wolforth that they had never repaired the fence and did not authorize Wilkes to make the repairs, and, beyond and above all this, it was not merely shown in evidence, but was proved that the fence on three sides of the pasture was kept up by persons with whom defendant had no connection. R. p. 11. R. p. 9.

In the light of this evidence, can a charge predicated upon the theory that plaintiff exercised exclusive occupancy, that he kept all others from the land, be sustained? Is there a remote suspicion to which the evidence gives rise that will warrant a charge treating it as making an issue? Is there a scintilla of evidence that remotely tends to show a fact that will warrant the court in making it an issue before the jury? We do not understand the law so to be; but there must be in the evidence something substantial, something sufficiently convincing to warrant a man of ordinary powers of reasoning in drawing a given conclusion from it before it makes an issue to go to the jury. The evidence may shadow forth something, but until it is sufficiently strong to sustain and support a conclusion based upon the presumptions it tends to raise, it raises no issue upon which the court can base a charge.

Second: When two or more persons own land in a common enclosure, any one of them may for his own or the common benefit exclude from such lands by fence or otherwise the cattle of all strangers, and he will not thereby become liable to his joint owner for rents, but such liability can arise only when he attempts to exclude his co-owner from the lands.

1 Sayles Statutes, 2431, et. seq.

Buford vs. Houtz, 133 U. S. p. 320.

Pace vs. Potter, 85 Tex., p. 473.

Myers vs. Dodd, 9 Ind., 290 (S. C. with extended note, 68 Am. Dec., 624.)

Tonawanda R. R. Co. vs. Munger, 5 Denio, 255 (S. C. with extended note 49 Am. Dec. 239.)

Kerwhacker vs. Cleveland & C R. R., 3 Ohio State, 172.

The above proposition read in connection with the court's charge complained of sharply raises the different theories contended for by plaintiff and defendant on the trial of the cause. The contention of the plaintiff was, and this contention the court sustained, that if defendant in excluding cattle from his own land excluded them from the land of plaintiff, he would be liable to plaintiff for the use and occupation of the land.

The court held that the mere exclusion of the cattle of strangers by defendant from plaintiff's land, and the permitting of his own cattle to graze upon such land gave plaintiff a right of recovery against him. This is not the law of this State and has never been; this is not the law of any State in which the old common law doctrine demanding that owners of cattle must not permit them to stray at large is not in force. At common law the rule is that the owner must fence his cattle in. Where States have passed enclosure laws, the law is that the owner of the lands must fence others' cattle out.

Since 1840 statutes have existed in the State of Texas requiring of the owners of cultivable lands that they place about them a sufficient fence to prevent the trespass of cattle. So long ago as that date the following statute (1 Sayles Statutes 2431) was passed: "Every gardener, farmer or planter shall make a sufficient fence about his cleared land in cultivation at least five feet high, and make such fence sufficiently close to prevent hogs from passing through the same." As conditions

have changed in the State further laws have been made upon the subject of fencing lands, but the common law doctrine at no time has ever prevailed in this State.

In the case of Davis vs. Davis, 70 Tex., p. 123, the Supreme Court say: "At common law the owner of the cattle was responsible far all damage done by them on the land of another, whether enclosed or not. But this rule has not been regarded as applicable to the condition of the lands in this State, where for a long time throughout its limits, and still in many sectons, the enclosure is the exception and the open land the rule."

The same court in the case of Ry. Co. vs. Johnson, 65 Tex., p. 393, say: "Since the fence law of 1840 the owner of unenclosed land has no right of action for the intrusion of stock upon it. The owner has constructive possession of his land, and that possession continues until there is actual desseizin by adverse occupancy or use." The doctrine that governs in the newer States of the Union, that applies, we take it, to all states which have fence laws, is well expounded in the case of Buford vs. Houtz cited above.

Since the trial of this case in the court below, the case of Pace vs. Potter, 85 Tex., 473, has been decided by the Supreme Court of the State of Texas, and that case is decisive of this. The facts in it were very similar to the facts in the case now under consideration. The Kit Carter Cattle Company owned a large body of land. Potter owned nine sections lying immediately west of that body of land. Other persons who pastured the lands lying contiguous to said Cattle Company's lands in enclosing their lands for pasture constructed lines of fence on the east, west, north and south sides of the lands belonging to Potter and the Cattle Company. The lines of fence thus constructed connected with each other, and the lands of Potter and the Cattle Company were thus included in a common enclosure. None of the lines of fence were constructed by the Cattle Company, and they had no interest in any of it except a half interest in about a mile on the south

side of that portion of the land afterwards sold to Pace. The Cattle Company used the land within its enclosure, including the land of plaintiff, for pasturing stock until about the month of July, 1888. At this time it built a fence north and south and along the east line of forty-one thousand acres which it sold to Pace, and thus the lands of Potter and Pace were left in a common enclosure. This fence was built at the instance of Pace and for him and as a part of the inducement of the sale by the Cattle Company to him. From the date of the purchase by Pace until March, 1889, Potter's nine sections were in Pace's enclosure and he used these sections for the pasturage of his cattle. It will be noted that the case just cited is stronger than the case of plaintiff in this suit. In plaintiff's case Lazarus had built no part of the fence, indeed a portion of it was owned by plaintiff himself. In the case cited the fence was built at the special instance and request of Pace, and as an inducement for his purchase. No part of it was owned by Potter. On these facts the lower court found that Pace became indebted to Potter for rent for the occupation of the land. The case was appealed to the court of Civil Appeals which affirmed the judgment of the lower court. From the Court of Civil Appeals it was carried by writ of error to the Supreme Court of Texas where the judgments of the District Court and the Court of Civil Appeals were reversed, the Supreme Court holding that plaintiff had no cause of action. They held that the facts indicated showed no exclusive use upon the part of defendant. They held that the common law making it the duty of the owner of cattle to confine them to his own land, and holding him liable for trespasses committed by them upon the land of another was never in force in the State of Texas, was inapplicable to the situation of its people and the customs and habits of its earlier settlers, and inconsistent with its legislation regarding fences and stock. They further held that Potter's land must be treated as unenclosed land in respect to the cattle of Pace; that the ap-

propriate remedy of Mr. Potter was to fence his own land. They say that "if defendant desired to protect his land from the cattle of the Kit Carter Cattle Company, his remedy was to fence it off. He did that. If he desired the same protection against Pace's cattle his remedy would have been the same. It does not appear, however, that he needed such remedy against the plaintiff. The plaintiff's condition was in every particular the same; that if desired protection against the cattle of the adjoining owners, his remedy was to construct a fence for the purpose. He did not do so. On the contrary, it seems the defendant constructed a fence for the sole purpose of protecting plaintiff's land. We do not think he was under obligations to do so, nor that before it was constructed he was liable to plaintiff for the acts complained of."

This case is stated thus fully because it is believed that it is decisive of the case at bar. It is believed that the question is one in which the rulings of the higher court of the State will be respected and followed by the Federal Courts. The rule laid down by the court is, in truth, a rule of property applying to the rights and duties of the owners of lands, and whatever might be the decisions of the Federal Courts aside from the rule announced by the Supreme Court of the State, yet when that rule is declared, we apprehend it will be followed.

But is it necessary to ask for a reversal of this case upon a ground so narrow? Is it necessary to invoke the doctrine that in cases of this kind the Supreme Court of the United States will follow the Supreme Court of the State, in order to show error in the judgment? Is it not sufficient to appeal to the pure principles of the law unfettered by consideration of local decisions? Is it not sufficient to appeal to its general doctrines as they should be declared by any court as an original proposition, to show the incorrectnesss of the holding of the lower court? If the common law doctrine were in force in the State, then whenever defendant's cattle had grazed

upon the lands of plaintiff, it would have been a trespass and he liable therefor. This, upon the ground that it was his duty to keep his cattle upon his own lands and not permit them to stray upon the lands of another. On the other hand, when the common law doctrine did not exist in the State of Texas, then when defendant's cattle grazed upon plaintiff's land, this was no trespass, and he was not liable therefor. This upon the ground that it was plaintiff's duty to enclose his land so as to shut therefrom cattle which were permitted to run at large. Can it be, even if defendant kept up the fences which were about the lands when he leased them, that he would be liable to plaintiff for rents? Whether the fences were there or not, he was guilty of no trespass in permitting his cattle to graze upon plaintiff's land. The erecting of the fence and excluding cattle from his own lands, though in such enclosure were embraced the lands of plaintiff, gave him no higher right, laid upon him no higher duty. He had the right to exclude from his own lands the cattle of all strangers, and if plaintiff's sections of land were so sandwiched between his sections that in excluding strangers' cattle from his own land he also excluded them from plaintiff's land, he would not thereby become liable to plaintiff. It is not contended that there was any effort whatever to exclude plaintiff from the land; it is not contended that there was ever any adverse use or occupancy or any claim of right against him, nor does the court in his charge place plaintiff's right of recovery on this ground, but he makes the fact that plaintiff excluded strangers from the lands, and permitted his own cattle to graze upon them an all-sufficient ground of recovery. The fact that he excluded strangers' cattle could give plaintiff no right, for defendant had the right to shut them out from his own land, and if in so doing he also shut them out from the lands of plaintiff, plaintiff could not thereby recover. The fact that he permitted his own cattle to graze upon plaintiff's lands could give plaintiff no right because the common law doctrine has never governed in the State of Texas, and

until plaintiff fenced his land no one would be liable for the trespass of cattle. Plaintiff's remedy, if he wished any, was to enclose his lands so as to shut them in from all trespassers.

Plaintiff's case is not one that appeals very strongly to a sense of right or justice, but is quite the contrary. He sues, not because he wished to use the land and was excluded therefrom, not because defendant was setting up any right against him, not becasue defendant's cattle were breaking through enclosures he had erected, not because defendant was opening his gates or tearing down his fences to get upon his lands, but solely because his lands were not lying open to the cattle of all the world, solely because defendant did what every one had the right to do,—permitted his cattle to graze upon unfenced lands,—solely because defendant saw fit, even upon plaintiff's own theory of the evidence, to exclude from his own land the cattle of other people, and in so doing excluded them from the lands of plaintiff.

Third: When fences are erected by one owner, or by third persons so as to include the land of two persons in a common enclosure, the fact that the owner not erecting the fences makes use of them to prevent his own cattle from leaving the enclosure, or to prevent the cattle of strangers from breaking into it and trespassing does not render him liable for rents to his co-owner.

III.

There was error in not instructing the jury that when two persons own land in a common pasture, either has the right to place his stock therein, and is not liable to the other therefor.

The charge as indicated in the above proposition was asked and refused. (Tr. p. 12.) It is plain that such refusal is error. But the point has been discussed so fully under the preceding proposition that it will not be gone into at length here.

IV.

If Lazarus was liable to Phelps at all, it would only be for so much of Phelps' grass as was consumed by Lazarus' cattle.

After the court had given the main charge shown, and had refused to given the charge indicated, defendant requested the court to give the following charges:

"First: Where several persons own separate tracts of land in the same enclosure, each one has the right to place stock enough therein to consume the grass upon his part of the land, and is not liable therefor; but if he places therein more stock than his part of the land will maintain, he would be liable to the owner for the excess but no more. R. p. 12.

Second: If you believe from the evidence that plaintiff's grass was consumed by the stock of the defendant and other persons, then defendant would only be liable for the part consumed by his own stock to be ascertained by apportioning the total damage in the proportion that the number of his stock bears to the total number doing the damage." R. p. 12.

These charges were refused by the court. And even if the court were correct in his theory of the case, it would seem clear that the refusal of them was error. The evidence of the defendant tended strongly to show that he had on the pasture not more stock than was sufficient to consume the grass on his leased lands. The evidence showed beyond controversy, as is

stated above, that a portion of the fences about the pasture was kept up by persons with whom defendant had no common interest. It also showed that there were about three thousand head of cattle in the common enclosure belonging to the settlers therein. Defendant would no more be liable for consuming plaintiff's grass than would these settlers. He certainly would not be liable for the grass that was consumed by the cattle of the settlers. If he were liable to plaintiff at all, then he would be liable as a trespasser, and he would be liable for the amount of damage done by his cattle, and the amount done would be the value of the grass which his cattle consumed. This the jury should have determined as best they could from the evidence, and the court should have charged that plaintiff would be liable for such proportionate amount of damage and no more.

We submit that there was error in the judgment, and we pray that it be in all things reversed and held for naught.

DILLARD & MUSE.

Attorneys for Plaintiff in Error, Samuel Lazarus.

F. C. DILLARD, of Counsel.

156-202

NOV 13 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

Term No., 105.

SAMUEL LAZARUS, PLAINTIFF IN ERROR,

vs.

JOHN J. PHELPS, WILLIAM E. BOND, AND THOMAS R. WHITE, JR., EXECUTORS OF WILLIAM WALTER PHELPS, DECEASED, DEFENDANTS IN ERROR.

Brief on Behalf of Defendants in Error.

LEAKE, HENRY & REEVES,
LEIGH ROBINSON,
For Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

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Brief on Behalf of Defendants in Error.

The defendants in error are the executors of the late William Walter Phelps, in whose stead they have been admitted to appear and defend the present writ of error.

On the day of trial in the court below defendants' testator owned, and for some years prior thereto had owned, the fee-simple title, and was in possession, as such owner, of 149,716 acres of Texas land. The sections of land owned by the said Phelps alternated with the sections owned by the school fund of Texas.

It was proved that the plaintiff had leased the lands in controversy and others to Curtis & Atkinson by an agreement expiring April 15, 1887, and by the terms whereof fences and water tanks were permitted to be erected by the

lessees upon the lands so leased, which would become the property of the lessor when the lease expired. Curtis and Atkinson did erect fences around said land or the greater portion thereof. (Rec., p. 7.)

In July, 1887, Lazarus, the defendant in the court below and plaintiff in error here, leased the alternate sections of the State land or the greater part of them, aggregating to 102,560 acres, and the evidence shows that very soon thereafter he proceeded to appropriate to himself the benefit of the whole pasture by herding thereon cattle in sufficient number not only to consume all the grass on the sections leased by himself, but all the grass upon the sections which had previously been leased by Curtis & Atkinson.

The plaintiff in the court below offered in evidence in the first place a judgment in a former suit between the same parties, which ascertained the facts, up to the date of the complaint filed in the present suit, to be as stated therein.

The plaintiff, however, by no means rested here, but, in addition to such *prima facie* presumption as is created by the evidence last mentioned, offered other proof showing the value of his land for grazing purposes, during the time complained of in the present action, to have been four cents per acre per annum, or $5,988.14 per annum. It was further shown that the whole of this pasture was stocked (and indeed overstocked) with cattle "in defendant's" (plaintiff in error's) "brand," with a few unimportant exceptions; that a ranchman in the employ of the said Lazarus was seen riding along the line of the fence, erected by said Curtis & Atkinson, for the purpose of repairing the same and securing the use thereof (Rec., pp. 7, 8, 9). It was proved that there was a large watering tank upon the land of the said Phelps, built by Curtis & Atkinson under their lease, but which, after the expiration of their said lease, had been used by said Lazarus for the supply of his cattle, exactly as the same had theretofore been used by the lessees of the said Phelps; that on one occasion, when cattle were driven into

this inclosure, the drover was informed that the consent of said Lazarus was necessary for any use of the pasture or water; that without such consent, the herds in question must be taken out of the pasture, as all the water and grass therein were claimed by Lazarus; that in the spring of 1890 the Western Cattle Company, by contract with Lazarus, had shipped and turned into the pasture 3,000 head of cattle, for the pasture of which they were to pay $1.50 per head (*i. e.*, $4,500) when delivered back. (*Id.*, 10.)

The defendant sought to oppose this proof by counter-proof.

Points and Authorities.

The case assumed by the plaintiff in error, and to which, in the main, the authorities cited on his behalf apply, is not the case as tried in the court below, nor that exhibited in the present record.

The court below did not try the case upon the theory that the owner of unfenced land in Texas can recover damages from the owner of cattle, which, in roaming the prairies, stray thereon and consume his grass. Nevertheless, such exception to the rule of the common law, so far as it may exist, is limited to the exemption of the owner of *straying* cattle from liability for their trespass upon unfenced land. It was never intended to bestow upon the cattle-owner himself the right of trespass *ad libitum*: the right to occupy and depasture the lands of others and use them year in and year out, exactly as if they were his own, simply because they are open to invasion. On the contrary, the legislature of Texas has specifically provided that "any person who shall control inclosed lands belonging to the public free schools and fail to pay the rental value, as specified under the provisions of this act, upon the demand of the collector, shall be subject to prosecution upon complaint, information, and indictment, and fined in the sum of one

hundred dollars for each section so inclosed." (Acts 1879, ch. 92, S. 6.)

The legislature has not made one law for the school-fund sections and an exactly opposite law for the sections adjacent thereto. The law of Texas makes no such invidious discrimination, as may be seen from the following citation:

"Where the owner of several tracts of land, inclosing them with one large inclosure, necessarily inclosed a tract belonging to another, this is an appropriation of such other person's land, and the pasture owner is liable *in trespass to try title* for rental value of the tract thus inclosed, although the pasture fence contains gates every three miles, and the pasture owner disclaims title and possession of such tract." (*St. Louis Cattle Company vs. Vaught*, 1 Texas Civil Appeals, 338.)

Referring to the claim of absolution afforded by the statutes in respect to straying cattle (which was made in that case as in this), the court makes this very natural comment:

"This doctrine, however, does not authorize the owner of cattle *by affirmative conduct on his part* to appropriate the use of such lands to his own benefit. He will not be permitted thus to ignore the truth that every one is entitled to the exclusive enjoyment of his own property. In this case the appellant, by means of fences constructed or maintained, inclosed the land of appellee in such manner as to reap from it those benefits which as a rule are incident exclusively to ownership. The use and enjoyment of the property under such circumstances import necessarily the idea of liability." (*Id.*, 390.)

It may be said here, as was said in the State of Kansas in the case of a similar contention, that it would not be within the power of a legislature to give one man the legal right to invade the property of another simply because the land-owner had not fenced it. In the event of such omission the land-owner "has not thereby lifted up the wrongs and

trespasses of others upon his own rights to be moral virtues or legal rights to be protected and encouraged by law, as seems to be supposed" (*U. P. R. R. Co vs. Rollins*, 5 *Kansas*, 167). "There is no statute that gives or attempts to give to any person any rights upon another's land, whether it is fenced or not. *A statute of that kind would tend to disturb vested rights and be unconstitutional and void*" (*id.*, 176). The language of another case may be exactly adopted in this. "This case, as that, was tried upon the *erroneous* theory that the plaintiff had a right to pasture his stock upon the unin-closed lands of the defendant." *Caulkins vs. Matthews*, *id.*, 199; *S. P. Larkin vs. Taylor*, *id.*, 446; *Powers vs. Kindt*, 13 *id.*, 74; *De Laney vs. Erickson*, 11 Nebraska, 533; *Otis vs. Morgan*, 61 Iowa, 712.)

The present action is the successor to one wherein the defendant's testator recovered judgment on February 5, 1890, for the use and occupation of said land. In Texas the verdict of a jury in such case ascertains damages down to the date of verdict and not simply to the institution of suit. This same judgment had ascertained that from July, 1887, to February 5, 1890, the said Lazarus had exclusive possession of the Phelps land and had appropriated the whole thereof to his own use. On writ of error from the circuit court the judgment aforesaid was affirmed in this court.

But the defendant in that action and plaintiff in error here, notwithstanding the judgment of the court that he could not lawfully appropriate to himself the Phelps land without paying the fair value thereof, continued his said occupation and persevered in his refusal to pay therefor, thus practically denying and disowning that he was either expressly or impliedly liable to account, as the court had adjudicated him to be. Thenceforward the occupation of the said Lazarus became an avowedly unlawful occupation and deliberate invasion of the Phelps land, and amounted, virtually, to a claim of right to use the same at his pleasure,

as if it were his own, relieved of all obligation to account therefor to the real owner.

The present action is, therefore, like that in 1 Texas Civil Appeals, 388, an action of trespass to try title, to ascertain whether this defiant invasion of proprietary right and defiant assertion of immunity therefor can go without accountability. As evidence of the state of affairs existing at the date of suit, the plaintiff in the court below proved that on September 17, 1888, he instituted suit "upon a petition containing allegations similar to those in this case against the defendant (plaintiff in error here) for the use of said land since the Curtis and Atkinson lease, and in said suit recovered judgment on the 5th of February, 1890, for the use and occupation of said land up to said date for the sum of $8,417. This evidence was offered to establish the fact that defendant did have exclusive possession of said land, as charged by plaintiff in said suit, and to show that plaintiff had claimed (in the former suit) for the use and value of his land from the time of the original occupation of the same by the defendant." (Rec., pp. 9 and 10.)

This being the conclusive proof of the state of affairs which existed the day before the damage arose, which the present action is brought to ascertain and recover, the presumption of law is that the same state of affairs continued the next day and thereafter, and had no other testimony been offered than this judgment a presumption would have been raised calling for rebuttal. "A judgment is always evidence of the fact that such judgment has been given and of the legal consequences that result from the fact" (1 *Starkie on Ev.*, 317; 1 *Greenleaf on Ev.*, 538). In the present instance the legal consequence which resulted from the fact was the conclusive proof that Lazarus did have exclusive possession of the Phelps land the day before that to which the suit of the latter related, and therefore the *prima facie* presumption that the same was the case the next day and all the days thereafter—that is to say, the *prima facie*

presumption of the whole case of the plaintiff in the court below, unless the same was successfully rebutted. In respect to the first assignment of error nothing more need be said.

In submitting the case to the jury the court said: "Now, if you believe from the evidence that since said 5th day of February, 1890, the defendant has had possession of the lands of plaintiff within said enclosure (and exclusive of the lawful rights of settlers upon school lands under the State enclosure laws), *has claimed and exercised the exclusive use and* enjoyment of plaintiff's lands for grazing purposes, and has attempted to exclude others therefrom, either by maintaining fences, or line-riding, or by force through his employés, or by any or all of these means, then you will find for the plaintiff such sum as the evidence shall show to be the reasonable value of the use and occupation of plaintiff's lands, so had by defendant for grazing purposes from said 5th day of February, 1890, to this date." (Rec., p. 12.)

The court further said to the jury: "If you believe from the evidence that the defendant, with intent to graze the lands of the plaintiff in common with his own, turned his cattle upon the lands or within the inclosure in numbers sufficient to consume the grass thereon, and to keep them stocked to their full capacity during the time from February 5, 1890, to this day, then you will find for the plaintiff the reasonable value of the use of his lands for such grazing purposes, as shown by the evidence, from February 5, 1890, to date." (*Id.*)

The plaintiff in error says that the court should not have given this charge, but instead thereof should have told the jury "that when two persons own land in a common pasture either has the right to place his stock therein and is not liable to the other therefor," or the court should have said, if the defendant (plaintiff in error here) placed upon the land more stock "than his part of the land will reasonably maintain, he will be liable to the other owners for the

excess, but no more," or this, if "plaintiff's grass was consumed by stock of defendant and other persons, then defendant would only be liable for the part consumed by his own stock," &c.

Certainly it would have been altogether out of place to confuse the jury by granting either of the last two requests when the liability of the defendant was expressly made to depend upon the fact (if so found by the jury) that he had "claimed and exercised *the exclusive use and enjoyment of plaintiff's lands for grazing purposes.*"

Two adjudications, one in Texas, the other in this Court, settle every question in relation to the charge which was given and the remaining request of defendant's counsel which was denied.

In the case already cited, *St. Louis Cattle Company vs. Vaught*, 1 Texas Civil Appeals, 388, two assignments of error were filed, the first to the charge of the trial court, which was as follows:

"If you find from the evidence that the defendant built and erected a fence completely inclosing a quantity of land, in which inclosure it embraced the survey sued for, and you find defendant is using the land sued for in the same manner it is using the other part of such larger enclosure—for the grazing of cattle—then the defendant is in possession of said survey No. 23; and if you so find, you will also find for plaintiff the value (if any) of the use and occupation of said survey No. 23 for the time said survey has been so embraced and used, not, however, giving the value of the use and occupation for a longer time than from May 4th, 1887, to the present time."

The special charge which was refused was as follows:

"If the defendant in inclosing its own land, which surrounded the land of the plaintiff, necessarily inclosed the land of the plaintiff, but made no claim of title to same, and placed none of its fences on plaintiff's land and did not refuse plaintiff the use and occupation thereof, but offered him free access thereto, the plaintiff could not be allowed to recover rent."

The court of appeals adjudicate:

"The charge complained of involves the conclusions reached by us and is therefore, in our opinion, proper. It hence follows also that the instruction requested was correctly refused."

It only remains to add that the identical proposition has received the sanction of this Court, in affirmation of the judgment which was rendered in the former suit between the same parties, and which was offered in evidence in the present case.

"*An owner of grazing land in Texas who stocks his land greatly in excess of the number which can be fed upon it, and permits them to go on and occupy and feed from the grass growing upon unoccupied land of a neighboring proprietor, with no separating fence, becomes liable to the latter for the rental value of his land so occupied.*"

Lazarus vs. Phelps, 152 U. S., 81.

"The defendant, upon the contrary, requested the court to charge that in Texas the law is that the owner of stock is not required to keep them in an inclosure or to prevent them from ranging the land of others, and that the owner of land trespassed upon by cattle cannot recover from the owner of the cattle damages for the trespass unless his land is fenced, and, further, 'that to entitle the plaintiff to recover in this suit you must believe from the evidence that the plaintiff's lands were fenced from those leased by the defendant. If there was a common inclosure around the lands of plaintiff and those leased by defendant and no fence separating such lands, then the plaintiff cannot recover.'

"The views of the court below, concisely stated, are contained in the instruction that if the defendant kept the inclosure so overstocked, as plaintiff claimed, then he is liable for the value of the rent of plaintiff's lands. The request of defendant, taken in connection with the instruction given, presents the respective views of the law entertained by counsel upon either side and upon which the case turned."

Id., 83, 84.

After a review of the Texas statutes in respect to cattle straying upon the land of others, which statutes were in that case with some elaboration spread before the court, the opinion proceeds as follows:

"It could never have been intended, however, to authorize cattle-owners deliberately to take possession of such lands, and depasture their cattle upon them, without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, or rather condoned, was an accidental trespass, caused by straying cattle." The case of *St. Louis Cattle Co. vs. Vaught*, 1 Texas Civil Appeals 338, 390, is cited and approved.

The testimony in the case under consideration is then recapitulated and the following conclusion announced:

"These facts certainly showed an intent on the part of the defendant to avail himself of the pasturage of the plaintiff's lands and fully authorize the instruction of the court to the jury that, *if the defendant overstocked the inclosure, he should be held liable to the plaintiff for the rental value of the lands.*" (*Id.*, 85, 86, 87.)

This decision in the former case is the adjudication of the whole controversy between the same parties in the present case.

LEAKE, HENRY & REEVES,
LEIGH ROBINSON,
For Defendants in Error.

~~15-5 U. S. 396~~

15-6 U. S 207

Ex Parte LOUIS F. STREEP,

Petitioner.

Petition *that a rule be granted for a mandamus requiring Hon. Charles L. Benedict, presiding and acting, as Judge of the Circuit Court of the United States of America, for the Southern District of New York, to resettle the Bill of Exceptions in the case of the United States vs. Louis F. Streep, according to the truth, as appears by the testimony taken on the trial of said Louis F. Streep.*

FRANK WARNER ANGEL,
Counselor for Petitioner,
108 Fulton Street,
New York City, N. Y.

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Ex-partie Louis F. Streep, Petitioner.

Petition that a rule be granted for a mandamus, requiring Hon. Charles L. Benedict, presiding and acting as Judge of the Circuit Court of the United States of America, for the Southern District of New York, to resettle the bill of exceptions in the case of The United States vs. Louis F. Streep, according to the truth as appears by the testimony taken on the trial of said Louis F. Streep.

To the Honorable the Supreme Court of the United States:

The petition of LOUIS F. STREEP respectfully shows to this Honorable Court as follows:

First. That on the 23rd and 24th days of January, 1894, your petitioner, a citizen of the United States of America, was tried before Hon. Charles L. Benedict, at a Circuit Court, in and for the Southern District of New York, and a jury, under an indictment charging your petitioner with violation of Section 5480, of the Revised Statutes of the United States of America.

Second. That on said trial your petitioner was found guilty by the jury, as charged in the indictment.

Third. That thereafter and on or about the 6th day of July, 1894, upon a case made, a motion was

4 made before said Hon. Charles L. Benedict, for a new trial and the same was denied.

Fourth. That thereafter, and on or about the 27th day of July, 1894, assignments in error were made and filed, a bill of exception made, settled and filed, a writ of error and citation issued and granted, to correct the error, if any had been done, in the conviction of your petitioner.

Fifth. That as appears by the stenographer's minutes taken on the trial of your petitioner, the the following request to charge was requested by the United States District Attorney, and submitted by the presiding judge to the jury totiden ver-
5 bis.

"*Mr. Molt.* I ask your Honor to charge that if "the jury find that the defendant was *absent from* "*the jurisdiction of this Court* for six months at "any time between the commission of this act "and the time of filing of this indictment, then "they can convict notwithstanding the lapse of "three years."

"*The Court.* Yes, I will give that charge."
"Exception by defendant."

That said request to charge above set forth, did in fact prejudice the jury and was made and granted against the rights of your petitioner as
6 will more fully appear, by the affidavits of John A. Anger, Samuel Wallach and Charles A. Ashforth, hereto annexed marked "A," "B," & "C."

Sixth. That after the conviction of your petitioner, the same charge, and in the same words, were part of the case used on the motion for a new trial.

Seventh. That thereafter and when the proposed

bill of exception herein was settled, the said re 7
quest to charge was changed so that the same now reads as follows in said bill of exception:

"*Mr. Mott.* I ask your Honor to charge that if "the jury find that the defendant was *absent* "*from the country as stated* for six months at "any time between the commission of this act and "the time of the filing of this indictment, then "they can convict notwithstanding the lapse of "three years."

"*The Court.* I will give that charge."
"Exception by defendant."

Eighth. Your petitioner respectfully states 8
that no such request to charge as set forth last above was made by the United States District Attorney on the trial and that such charge and alteration as shown above and as will more fully appear by the affidavit of the Court Stenographer who took the Stenographer's notes on the trial of your petitioner, and hereto annexed marked "D," and the affidavit of Maurice Meyer, who was at that time your petitioner's solicitor, and hereto annexed, marked "E," were changed after the conviction of your petitioner to his prejudice and against his rights.

Ninth. That thereafter and through petitioner's 9
solicitor, Mr. Frank W. Angel, your petitioner moved for a resettlement of the bill of exception, so that the same should conform to the request to charge, which was actually submitted to the jury, and that said resettlement be made *nunc pro tunc, as of July 27th, 1894*, which said motion was denied, as appears by the annexed copy of order, marked "F".

Tenth. Your petitioner further shows that the

10 citation herein has heretofore been extended, pending the hearing and determination of said motion to resettle said bill of exception until the 22nd day of December, 1894.

Eleventh. Your petitioner further shows that in pursuance of said citation and extensions thereof, the Clerk for the United States Circuit Court, for the Southern District of New York, has made his return but that the case herein has not as yet been docketed.

Wherefore your petitioner respectfully prays that a rule for a mandamus be granted under the seal of this Court, to be served on the Honorable
11 Charles L. Benedict, Judge of the United States District Court for the Eastern District of New York, and acting as United States Circuit Judge in and for the Southern District of New York in Criminal Cases, commanding him to be, and appear before this Court, either in person or by an attorney of this Court, on a day to be fixed by this Honorable Court to show cause, if any he have, why a mandamus should not be awarded to the said Honorable Charles L. Benedict, District Judge as aforesaid, commanding him—

To resettle said bill of exceptions as to said requests to charge, according to the truth as the same appears by the stenographer's minutes taken on the trial of your petitioner.

12 That if sufficient cause is shown on the return of the rule for a mandamus and the mandamus is granted by this Honorable Court as hereinbefore prayed, then that the clerk of this Court be directed to forward to the clerk of the Circuit Court, in and for the Southern District of New York, the record now in his possession, so that the said bill of exception may be duly resettled and corrected, as may be directed in said mandamus.

And your petitioner will ever pray, etc. 13

FRANK W. ANGEL,
Counsel for petitioner.

LOUIS F. STREEP,
Petitioner.

United States of America,
Southern District of New York. } ss.

LOUIS F. STREEP being duly sworn, says, that he is the above named petitioner, that the foregoing petition is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

LOUIS F. STREEP. 14

Sworn to before me this
8th day of January, 1895.

H. C. VAN VECHTEN,
[SEAL] Notary Public,
Kings County.

Certificate filed in N. Y. County.

15

16 **Paper referred to in annexed petition as marked "A."**

United States of America, Southern District of New York, } ss:

JOHN A. ANGER, being duly sworn says, he resides at No. 204 E. 116th Street, in the City of New York, and is engaged in the business of Baker.

That he was one of the jury that tried the defendant Louis F. Streep.

That the charge of the Court, that the defendant mailed the letters in question and was engaged in a scheme to defraud, together with the charge that
17 mere absence from the jurisdiction of the Court was sufficient to convict, were the reasons that caused deponent to find the defendant guilty.

That deponent heard discussed these facts in the jury room among other matters, some of the jury relying on the above charge and the fact that the defendant did not go on the stand nor his attorney sum up, were the reason that the defendant was convicted.

That the jury were out over two hours and the facts hereinbefore mentioned were the arguments used to bring about a verdict against the defendant.

JOHN A. ANGER.

18 Sworn to before me this 14th day of January, 1895.

(SEAL) WM. N. LOEW,
Notary Public,
N. Y. City and Co.

Paper referred to in annexed petition as marked "B."

United States of America, Southern District of New York. } ss:

SAMUEL WALLACH, being duly sworn says, he resides at No. 136 E. 78th St., in the City of New York, and is engaged in the business of Importer of Diamonds.

That he was one of the jury that tried the defendant, Louis F. Streep.

That the charge of the Court, that the defendant mailed the letters in question and was engaged in a scheme to defraud, together with the charge that mere absence from the jurisdiction of the Court was sufficient to convict, were the reasons that caused deponent to find the defendant guilty.

That deponent heard discussed these facts in the jury room among other matters, some of the jury relying on the above charge and the fact that the defendant did not go on the stand nor his attorney sum up, were the reasons that the defendant was convicted.

That the jury was out over two hours and the facts hereinbefore mentioned were the arguments used to bring about a verdict against the defendant.

SAMUEL WALLACH.

Sworn to before me this 14th day of January, 1895.

(SEAL.) JOHN JENKINS, JR.,
Notary Public,
Cert. filed in N. Y.,
& Kings Co.

22 **Paper referred to in annexed petition as marked "C."**

United States of America, }
Southern District of New York. } ss.

CHARLES A. ASHFORTH, being duly sworn says, he resides at No. 1408 Park Ave., in the City of New York, and is engaged in the business of Printer.

That he was one of the jury that tried the defendant Louis F. Streep.

That the charge of the Court, that the defendant mailed the letters in question and was engaged in a
23 scheme to defraud, together with the charge that mere absence from the jurisdiction of the Court was sufficient to convict, were the reasons that caused deponent to find the defendant guilty.

That deponent heard discussed these facts in the jury room among other matters, some of the jury relying on the above charge and the fact that the defendant did not go on the stand nor his attorney sum up, were the reason that the defendant was convicted.

That the jury were out over two hours and the facts hereinbefore mentioned were the arguments used to bring about a verdict against the defendant.

CHARLES A. ASHFORTH.

24 Sworn to before me this }
12th, day of January, 1895. }

(SEAL.) HERRMANN BOLTE,
Notary Public,
N. Y. Co.

Affidavit referred to in foregoing petition as marked "D."

United States of America, Southern District of New York. } ss:

WILLIAM P. CHERRY being duly sworn says, I am the Stenographer who took the stenographic notes on the trial of Louis F. Streep, on the 23rd and 24th days of January, 1894, before Hon. Charles L. Benedict, acting as Circuit Judge for the Southern District of New York, in the case of the United States vs. Louis F. Streep, and I find the following in my short-hand notes of the trial:

"*Mr. Mott.* I ask your Honor to charge that if "the jury find that the defendant was absent from "the jurisdiction of this Court for six months at any "time between the commission of this act and the "time of the filing of this indictment then they can "convict notwithstanding the lapse of three years."

"*The Court.* Yes, I will give that charge.

"Exception by defendant."

WM. P. CHERRY.

Sworn to before me this 5th day of January, 1895. }

[SEAL.] CHARLES A. MORRISON,
Notary Public.
N. Y. County.

28 **Affidavit referred to in the foregoing petition as marked "E."**

United States of America, }
Southern District of New York. } ss.

MAURICE MEYER, being duly sworn says, that at the time of the settlement of the bill of exception in the case of the United States of America against Louis F. Streep, who was the solicitor for said defendant Louis F. Streep, and continued as such solicitor until on or about the 28th day of September, 1894, when Mr. Frank W. Angel, was substi-
29 tuted as solicitor for said defendant.

Deponent further says that he prepared said bill of exceptions and served a copy thereof on the United States District Attorney for the Southern District of New York.

Deponent further says that said United States District Attorney did not serve in writing any proposed amendments to said bill of exceptions but that your deponent and assistant U. S. District Attorney Mott, agreed upon and made the amendments to said proposed bill of exceptions.

Deponent further says that at the time of the adjustment of the amendments to the said bill of exceptions as aforesaid the following request to
30 charge made by the U. S. District Attorney on the trial of said defendant Louis F. Streep was in no way amended.

"I ask your Honor to charge that if the jury find "that the defendant was absent from the jurisdic-"tion of this Court for six months at any time be-"tween the commission of this act and the time of "the filing of this indictment then they can convict "notwithstanding the lapse of three years."

Deponent further says that after consenting to

the amendments to said proposed bill of exceptions 31
made by said assistant U. S. District Attorney he had said bill of exceptions retypewritten and duly forwarded to the Hon. Charles L. Benedict before whom said defendant Louis F. Streep was tried, for settlement.

Deponent further says that said Judge settled said bill of exception as agreed upon between your deponent and said Assistant U. S. District Attorney with the exception that said request to charge hereinbefore mentioned was changed and altered by him so that the same now reads as follows :—

"I ask your Honor to charge that if the jury find "that the defendant was absent from the country "as stated for six months at any time between the 32
"commission of this act and the time of the filing "of this indictment then they can convict notwith- "standing the lapse of three years."

MAURICE MEYER.

Sworn to before me this third day of January 1895.

S. A. HAYMAN,
Notary Public,
Kings County,
[Seal.] Certificate filed in
N. Y. Co.

33

34 **Order and papers referred to in the foregoing petition as marked "F."**

At a Special Term of the United States Circuit Court for the Southern District of New York, held at the Court House, in the City of New York, this 30th day of November, 1894.

Present:

HON. CHARLES L. BENEDICT,
Judge.

35 THE UNITED STATES

against

LOUIS F. STREEP.

On reading and filing the annexed notice of motion, dated October 16th, 1894, and the affidavit of Frank W. Angel, verified the 26th day of November, 1894, and after hearing Frank W. Angel, Solicitor for defendant on behalf of said motion and Wallace Macfarland, Attorney for United States, in opposition thereto,

36 It is ordered that said motion be and the same hereby is denied.

CHARLES L. BENEDICT.

Papers referred to in foregoing order marked Exhibit "F." 37

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES,

against

LOUIS F. STREEP.

Sir. 38

You will please take notice, that upon the annexed affidavit I shall apply to the Honorable Charles L. Benedict, (before whom this action was tried) at the Court House in the City of New York, N. Y., on the 30th day of November, at 10 A. M. for an order granting the defendant herein an exception, and an assignment of error as mentioned in the annexed affidavit, and that the bill of exception be resettled so as to conform to the evidence actually taken and submitted to the Jury on the trial herein, and also set forth in the annexed affidavit, and that said relief and the papers on which this application is made together with such order as may be granted in the premises, be 39
filed nunc pro tunc as of July 27th, 1894, and that the return of the citation be extended until the final determination of this application and the entry of the order thereon, and for such other and further relief as may be just.

Dated, New York, October 16th, 1894.

FRANK W. ANGEL,
Sol. for Defendant.

To Hon. WALLACE MACFARLANE,
U. S. Dist. Atty.

40 U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES

against

LOUIS F. STREEP.

Southern District of New York, ss :

41 FRANK W. ANGEL, being duly sworn says :

That this action was tried before his Honor Charles L. Benedict, and a jury, on the 23rd and 24th days of January, 1894, and resulted in a conviction of the defendant.

That thereafter on a prepared case, a motion for a new trial was made and the same was denied.

That thereafter the said case was turned into a bill of exception, assignment of error made, and a writ of error granted, and citation issued, and the time for the return thereof extended by order, until the 29th day of October, 1894.

That after the granting of the writ of error herein, this deponent was substituted as solicitor for the defendant.

42 That by the minutes taken on the trial of said action.

The Court charged:

"Gentlemen of the Jury, I presume you will "have no difficulty in finding upon this evidence "that the accused mailed these letters on the 20th "and 23d of May, 1889, as charged, and that these "letters show that he had a scheme to sell counter-"feit money."

That no exception appears on the minutes or in 43
the bill of exception, to this specific charge.

That the following request to charge as appears by the said minutes, was made by the District Attorney and submitted *totidem verbis* to the jury.

"*Mr. Mott.* I ask your Honor to charge that if "the jury find that the defendant was *absent from* "*the jurisdiction of this Court* for six months at "any time between the commission of this act and "the time of the filing of this indictment then they "can convict notwithstanding the lapse of three "years."

" *The Court.* Yes I will give that charge."

"Exception by defendant." 44

That after the trial of said action and the conviction of the defendant, said request was changed by certain person or persons unknown to deponent, so that the same reads in the bill of exception herein, as follows :

" *Mr. Mott.* I ask your Honor to charge that if the jury find that the defendant was *absent from* "*the country* as *stated* for six months at any "time between the commission of this act and the "time of the filing of this indictment, then they can "convict notwithstanding the lapse of three years."

" *The Court.* I will give that charge.

"Exception by defendant." 45

Deponent further says, that no such request as set forth last above was made by the District Attorney on the trial, and that such charge as shown above and by the minutes taken on the trial have been willfully changed without the consent or knowledge of this defendant after his conviction by the jury.

That deponent has had the minutes as to the foregoing facts, compared with the stenographer's

46 notes taken on the trial, and that the extracts of the minutes as to what the requests actually was is correctly stated as first herein mentioned.

Deponent further asks

First. That the defendant be granted an exception to the charge of the Court first herein mentioned; and that he be granted an assignment in error as to such charge.

Second. That the bill of exceptions herein be re settled so that the same shall conform to the request to charge which was actually submitted
47 the jury.

Third. That such exception, assingment of error and re-settlement of the bill of exception be made *nunc pro tunc* as of July 27th, 1894.

F. W. ANGEL.

Sworn to before me this 26th day of November, 1894.

CHARLES L. HUBBELL,
Notary Public,
Richmond County.

Certf. in N. Y. Co.

48

Ex. partie Louis F. Streep. 49

In the Matter of Louis F. Streep,

Plaintiff in error,

against

United States of America.

Rule for a Mandamus.

Mr. Frank W. Angel, of counsel for the plaintiff in error in the above named case, upon a duly 50
verified petition, moved the Court for a rule to be granted to be served on Hon. Charles L. Benedict, District Judge of the District Court of the United States, for the Eastern District of New York, acting as Judge of the Circuit Court of the United States for the Southern District of New York, commanding him to be and appear before this Court either in person or by an attorney of this Court, on the day of Anno domini 1865, to show cause, if any, why a mandamus should not be awarded to the said Circuit Judge of the Southern District of New York, commanding him to resettle the bill of exceptions in a certain case lately pending in the said United States Circuit Court of the Southern District of New York, 51
and before him tried, wherein the United States of America were plaintiffs and the said Louis F. Streep was defendant. So that the charge requested by the Honorable District Attorney and made by the Court shall appear and read in said Bill of exceptions as follows:

"*Mr Mott.* I ask your Honor to charge that if "the jury find that the defendant was *absent from*